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№. 08-521

Supreme Court, U.S.
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In The Supreme Court of the United States

GUY ABRAMS, ET AL.,
Petitioner,

v.

BESSIE JONES,
ADMINISTRATRIX OF THE ESTATE
OF NATHANIEL JEFFREY JONES,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Approximately four years ago, in September 2004, the estate of Nathaniel Jones sued the Cincinnati Police Department, Cincinnati Fire Department, individual Defendant Cincinnati Police Officers and the individual Cincinnati Firefighters in Federal Court. Mr. Jones' estate seeks damages to redress the violation of his Fourth Amendment right to be free from unreasonable seizure, and excessive force, his Fourteenth Amendment right to receive immediate and appropriate medical care for injuries inflicted by the Defendants, and not to be deprived of his life without due process, and state law claims including assault, battery, wrongful death and gross negligence.

On November 29, 2003, Mr. Jones had stopped to visit friends at a White Castle in Cincinnati, Ohio. Sometime between the morning hours of 3:00 and 5:30 on November 30, 2003, while visiting the White Castle restaurant, Mr. Jones became ill and needed medical attention. He lost consciousness and fell to the pavement in the White Castle's parking lot. A White Castle employee ran inside

and dialed 911 seeking emergency medical treatment for Mr. Jones.

Sometime later, the Cincinnati Fire Department responded to the request for medical services. The firefighters directed their attention to the employee who called 911 and had in her moment of deep concern for Mr. Jones begun to hyperventilate. At some point, Mr. Jones regained consciousness and entered White Castle. His close friend, a White Castle employee, noticed his condition, handed him a cup of water and directed the firefighters' attention to him. The firefighters refused to evaluate treat and/or care for Mr. Jones and told the female employee that they would not treat Mr. Jones but would call the Police Department.

Moments later, Mr. Jones, walking and dancing, exited the White Castle Restaurant. He continued in a like manner in the parking lot. At no time was Mr. Jones committing an unlawful act, nor was he causing damage to persons or property. At some point the firefighters contacted the Cincinnati Police. The firefighters never personally attempted to speak with Mr. Jones or to assess his

condition, and received no complaint about Mr. Jones' behavior from employees from White Castle, who called the firefighters to provide medical assistance. Nevertheless, the firefights described Mr. Jones as a nuisance.

When police officers began to arrive at the White Castle, P.O. Pike contacted dispatch and requested an MHRT (Mental Health Response Team) to respond to the scene, and also requested a supervisor with a tazer. P.O. Pike and Osterman approached Mr. Jones and unlawfully tried to subdue him rather than waiting for a MHRT or a supervisor with a tazer to respond. In fact, P.O. Pike made a decision that no MHRT was needed, and immediately approached Mr. Jones even though MHRT unit and a supervisor were in route.

P.O. Pike failed to maintain an appropriate reactionary gap. Mr. Jones was not presenting a danger to any person or property when P.O. Pike approached him, thus no officer should have approached within twenty-one feet of Mr. Jones. Had P.O. Pike maintained an appropriate reactionary gap, no assault would have occurred,

and neither Mr. Jones nor Defendants would have suffered any injury whatsoever.

Instead, P.O. Pike and Osterman began to savagely beat Mr. Jones with their PR-24s. P.O. Abrams, Slade, and Reese also arrived and began using their PR-24s on Mr. Jones as well. Mr. Jones was struck at least 33 times in quick succession. The officers never allowed him an opportunity to comply with verbal commands, to put his hands behind his back, or to be placed in a sitting position that would allow air to enter his lungs.

As Mr. Jones waved his hands in attempts to ward off the blows, the officers continued to strike him, even when he was on his hands and knees, unable to place his hands behind his back or to strike at the officers. At no time did the officers disengage or de-escalate as recommended by Cincinnati Police Department policy.

Several different officers sprayed chemical irritant in Mr. Jones' face even while the officers used the combined force of their bodies to press undue weight on the Mr. Jones' back restricting movement of Mr. Jones' diaphragm resulting in

lack of air exchange in his lungs. Other officers pressed Mr. Jones down to the ground as they handcuffed him. As the officers pressed their combined weight on Mr. Jones, and as Mr. Jones struggled to twist his body from under the crushing weight so that he could breathe, the officers exerted additional force, preventing Mr. Jones from getting any air, and putting further strain on Mr. Jones' heart. After sitting on Mr. Jones in this position, the officers stood up and walked around.

The officers ignored Mr. Jones and left him face down in handcuffs. They did not hear any gasps or sounds of breath coming from Mr. Jones, did not look to see if Mr. Jones was breathing, and took no action to ensure that he could breathe; they did not roll him over or immediately sit him up. P.O. Osterman did not look to see if Mr. Jones was breathing. Although he knew Mr. Jones was not breathing when Mr. Jones was rolled over, P.O. Osterman did not provide any respiratory support, mouth-to mouth or CPR. After brutally beating Mr. Jones and spraying him with chemical irritant, the officers left Mr. Jones laying face down on his stomach, hands cuffed behind his back on the asphalt pavement for a prolonged time, which

directly contributed to and caused Mr. Jones' death. When the officers noticed that Mr. Jones was not breathing, they stood around Mr. Jones and discussed the absence of Firefighters.

The officers' conduct was in direct violation of CPD policy and training which warns that after a struggle, "to move [the individual] to a seated position. Do not leave the person prone on the ground. Look for signs of troubled breathing – [g]asping, shallow breathing. . ." The CPD Staff Notes emphasize, "[a]s soon as possible get handcuffed person off their stomachs and into a seated or standing position."

Petitioners have yet to answer Mr. Jones' estate's complaint, filed more than four years ago. Instead, they filed a Motion to Dismiss in December 2004. In response, Mr. Jones' estate filed an amended complaint in January 2005 and in February 2005, filed a Motion for Leave to File a Second Amended Complaint which the Court granted in March 2005. In April 2005, Petitioners filed a Motion to Dismiss Mr. Jones' estate's Second Amended Complaint which the Court denied in part and granted in part in October 2006.

Petitioners appealed the denial of their Motion to Dismiss to the Sixth Circuit and the District Court stayed the case pending that decision.

In April 2008, the Sixth Circuit affirmed the decision of the District Court denying Petitioners' Motion to Dismiss. On April 14, 2008, Petitioners filed a petition for rehearing *en banc*. In June 2008, Mr. Jones' estate moved the District Court for leave to file a third amended complaint which the District Court granted. The same day, Petitioners filed a Motion for Reconsideration regarding the District Court's grant of leave to file an amended complaint. On June 17, 2008, the District Court granted Petitioner' Motion for Reconsideration and vacated its order granting the Motion to File a Third Amended Complaint. On July 31, 2008, the Sixth Circuit denied Petitioners' Petition for Rehearing and Defendant subsequently filed this petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied. Petitioners' argument that Federal Rule of Civil Procedure 10(c) required the District Court

and the Sixth Circuit to accept the truth of Petitioners' self-exculpatory statements in resolving Petitioners' 12(b)(6) motion to dismiss is frivolous. Furthermore, Petitioners' assertion that the federal circuits are in conflict over Rule 10(c) is entirely without merit. None of the circuit decisions submitted by Petitioners reveals any conflict between the circuits regarding Rule 10(c).

Petitioners' assertion that the Sixth Circuit "disregarded" *Scott v. Harris* entirely lacks record support. Petitioners admit that they fully apprised the Sixth Circuit of this Court's decision in *Scott v. Harris*. To conclude that the Sixth Circuit disregarded *Scott v. Harris* solely because the Sixth Circuit affirmed the District Court's decision not to consider incomplete video tape evidence submitted by Petitioners with their 12(b)(6) motion is without merit.

Petitioners' assertion that there is conflict among the federal circuits as to whether the "deliberate indifference" standard applies to claims alleging a failure to provide medical care to detainees is also entirely without merit. In making this conclusion, Petitioners conflate principal with

application. None of the cases Petitioners have submitted in support of their assertion reveal the slightest conflict, as every decision regarding a failure to provide medical care to a detainee submitted by Petitioners deploys the deliberate indifference standard.

Petitioners have failed to provide any plausible reason why they should not be required to answer Respondents' allegations and discover the truth about Nathaniel Jones' death, after *more than four years* of litigation. The Petition for Writ of Certiorari should thus be denied.

ARGUMENT

I. RULE 10(c) JURISPRUDENCE IS CONSISTENT ACROSS THE FEDERAL CIRCUITS, AND PETITIONERS' ASSERTION THAT FEDERAL CIRCUITS ARE IN CONFLICT OVER RULE 10(c) FINDS NO SUPPORT IN THE CASE LAW TO WHICH PETITIONERS CITE.

Throughout the course of this litigation, commenced in *September of 2004*, Petitioners have

consistently avoided addressing head-on the allegations in Respondents' complaint. As the Sixth Circuit noted in affirming the District Court's order granting in part and denying in part Petitioners' Rule 12(b)(6) Motion to Dismiss, "[t]hroughout their briefs, defendants do not directly challenge the proposition that the facts alleged in the complaint state valid constitutional claims."[1] The present petition only amounts to further avoidance.

Petitioners' assertion that the Sixth Circuit "rewrote its own rule of civil procedure," in declining to accept as true self-exculpatory statements made by Petitioners during the course of an internal investigation into Nathaniel Jones' death, is entirely without merit and contrary to the very case law Petitioners proffer in support of their assertion. The frivolity of Petitioners' argument cannot be overstated. For example, in addressing an argument substantially identical to Petitioners', the Seventh Circuit opined:

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[1] App. 10a.

The state makes the fantastic argument that by appending the board's decision, with its recitation that Carroll had "refused" to appear before the board, to his complaint, Carroll vouched for the truth of the recitation and therefore pleaded himself out of court. According to the state, *all* facts contained in *any* attachments to a complaint "are [automatically] deemed facts alleged as part of [the] complaint." And so the "fact" that Carroll had refused to attend the board's meeting was a fact "stated in his complaint," and he could not amend his complaint in his brief; he could not contradict "his complaint's allegation that he refused to appear" before the board.

He had appended the board's decision not in order to vouch for the truth of the statements in it, but to show that he had exhausted his administrative remedies. Although a "copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes," Fed. R. Civ. P. 10(c), dismissal on the basis of facts in that instrument is proper only if the plaintiff

relies upon it "to form the basis for a claim or part of a claim," which of course, he was not doing here. The logic of the state's argument is that an appellant, required by the appellate rules to append to his brief the decision of the District Court or administrative agency that he is appealing, by doing so kills the appeal because appending amounts to vouching for the truth of the propositions in the appended decision.

The argument if accepted would do wonders for our workload, but is beyond nonsensical and unworthy of the office of the Attorney General of Illinois... These are unprofessional lapses. The state is ordered to show cause within 14 days why it should not be sanctioned for the frivolous argumentation in its brief.[2]

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[2] *Carroll v. Yates*, 362 F.3d 984, 986 (7th Cir. Ill. 2004) (internal case citations omitted).

Remarkably, Petitioners presently submit this Seventh Circuit opinion in support of their insistence that the Sixth Circuit has run amok.[3]

Yet, in declining to adopt Petitioners' interpretation of Rule 10(c), the Sixth Circuit similarly held:

> Even if we assume that a transcript of an interview constitutes a "written instrument," treating a transcript as part of a pleading does not mean that we assume everything the officers said in those interviews is true. Where a plaintiff attaches to the complaint a document containing unilateral statements made by a defendant, where a conflict exists between those statements and the plaintiff's allegations in the complaint, and where the attached document does not itself form the basis for the allegations, Rule 10(c) "does not require a plaintiff to adopt every word within the exhibits as true for purposes of pleading simply

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[3] Petition at 9, fn. 14.

> because the documents were attached to the complaint to support an alleged fact." Rather, we treat the exhibit as an allegation that the officers made the statements in the transcripts and we treat that allegation as true. Thus, we accept as true that on June 24, 2004 Officer Pike said that no officer put weight on Jones's back during the handcuffing process... We do not accept as true, however, that Officer Pike's statement is accurate or true; this is a question of credibility and weight of the evidence that is not before a court considering a motion to dismiss.[4]

The Sixth Circuit's elucidation of the applicable principle in Rule 10(c) hardly constitutes a "rewriting" of the rule. Rather, the principle applied by the Sixth Circuit has been consistently applied by other circuit courts addressing the issue whether attachment of an exhibit to a complaint

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[4] App. 11a (citing *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454-56 (7th Cir. 1998).

necessarily renders true every statement contained in the exhibit upon dispositive motion.[5]

Petitioners' assertion that the federal circuits are in conflict over Rule 10(c) is false. None of the cases submitted by Petitioners in support of their assertion reveals the slightest inconsistency in Rule 10(c) jurisprudence. Rather, Petitioners conflate principle with application, in fallaciously concluding that the circuits must be in conflict over Rule 10(c) because some circuits in some cases have concluded that plaintiffs pled themselves out of court by attaching exhibits to their complaints.[6]

A. The Seventh Circuit.

Petitioners submit four Seventh Circuit cases in support of their assertion that the federal

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[5] *See Gant v. Willingford Bd. of Educ.*, 69 F.3d 669, 674 (2nd Cir. 1995) (plaintiff did not adopt superintendent's exculpatory statements by attaching superintendent's report to the complaint); *N. Ind. Gun & Outdoor Shows v. City of South Bend*, 163 F.3d 449, 452-454 (7th Cir. 1998); *Carroll v. Yates*, 362 F.3d 984 (7th Cir. 2004).

[6] Petition at 8-11.

circuits are in conflict over Rule 10(c),[7] *Thompson v. Illinois Dep't of Prf'l Regulation*,[8] *Riggins v. Walter*,[9] *Matter of Wade*,[10] and *Carroll v. Yates*.[11] Respondents have already demonstrated that *Carroll* involved an argument substantially identical to Petitioners', and that the Seventh Circuit applied Rule 10(c) just as the Sixth Circuit did in the present case. Petitioners' assertion that *Carroll* reveals conflict in the circuits and specifically between the Seventh and Sixth Circuits is without merit.

Thompson involved dismissal of the plaintiff's First Amendment retaliation claim where he alleged that he was demoted from his position as Chief Administrative Law Judge because of his political beliefs and associations.[12] The plaintiff

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[7] *Id.* at 9.

[8] 300 F.3d 750 (7th Cir. 2002).

[9] 279 F.3d 422 (7th Cir. 1995).

[10] 969 F.2d 241 (7th Cir. 1992).

[11] 362 F.3d 984 (7th Cir. 2004) (discussed *supra* at pg. 2-3).

[12] 300 F.3d 750, 753-755 (7th Cir. 2002).

attached to his complaint the Chief ALJ job description and the description of the job to which he was demoted, in alleging the adverse employment action element of his claim.[13] Accepting as true the description of the Chief ALJ position, alleged and affirmed by the plaintiff as a component of his demotion, the Court found that the Chief ALJ was a "policymaking official," and thus terminable at will for political reasons.[14] *Thompson* involved a job description alleged by the plaintiff as a core element of his retaliation claim. Petitioners' assertion that the Seventh Circuit applied a different rule in *Thompson* than the Sixth Circuit applied in the case at bar ignores the obvious difference between the two cases: in the case at bar, Respondents do not plead Petitioners' self-exculpatory statements as an element of their claims.[15] Petitioners' assertion that *Thompson* reveals conflict among the federal circuits over Rule 10(c) jurisprudence is thus without merit.

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[13] *Id.* at 754-755.

[14] *Id.* at 757-758.

[15] *Id.* at 754-755.

Riggins involved a prisoner's claim that a prison guard violated his due process rights by placing him in segregation to punish him, without a predeprivation hearing.[16] However, the prisoner attached to the complaint *his own statement* that he was segregated for the purpose of investigation and not punishment.[17] The Court accepted his own statement as true pursuant to Rule 10(c) and Rule 12(b)(6), as it was dispositive of a core element of his claim. Under the relevant state administrative law the prisoner was not due a predeprivation hearing if placed into segregation for the purpose of investigation.[18] *Riggins* involved accepting the plaintiff's own admission and not the self-exculpatory statement of his opponent, and does not evidence conflict among the federal circuits over Rule 10(c) jurisprudence as Petitioner presently asserts.

The Matter of Wade involved dismissal of the plaintiffs' claim that the government covered up its possession of certain documents requested by the

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[16] 279 F.3d 422, 425-426 (7th Cir. 1995).

[17] *Id.*

[18] *Id.*

plaintiffs pursuant to *FOIA*.[19] Specifically, the plaintiffs alleged that a government official made a transcribed admission. According to plaintiffs, he admitted he possessed documents of which the government denied possession when the plaintiffs made a *FOIA* request.[20] The plaintiffs attached the government's letter in response to their *FOIA* request to their complaint, and attached the alleged transcript of the government official's admission to their response to the motion to dismiss.[21] The letter in response to the *FOIA* request stated that the government was not in possession of the requested documents, and the alleged transcript did not include an admission of possession by the government official. As the official's admission was essential to the plaintiffs' coverup claim, and as the *FOIA* response letter and alleged transcript were attached to the plaintiffs' pleadings to establish the coverup, the Court construed the attachments as true on defendant's

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[19] 969 F.2d 241, 248-250 (7th Cir. 1992).

[20] *Id.* at 249-250, fn. 12.

[21] *Id.* at 250.

motion to dismiss.[22] The Seventh Circuit's decision to accept the truth of statements in documents the plaintiffs themselves alleged to establish a coverup reveals no inconsistency between the Sixth Circuit's decision in the present case and Rule 10(c) jurisprudence across the federal circuits. Rather, it reveals an application of Rule 10(c) to facts bearing no resemblance to those in the present case.

In *Wade*, the claim consisted solely of the allegation that an admission existed in the document submitted to the court. In *Wade*, that statement did not, in fact, exist. Here, Mr. Jones' estate in no way relies on any admission or denial of the officers involved to prove the claim. In asserting that *Wade* demonstrates the existence of a circuit split, Petitioners conflate Rule 10(c) with its application to diverse circumstances. The petition should thus be denied because Petitioners' assertion that cases from the Seventh Circuit reveal conflict between the federal circuits over Rule 10(c) is without merit.

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[22] *Id.*

B. The Third Circuit.

Petitioners assert that *ALA, Inc. v. CCAIR, Inc.*[23] "ruled differently than the Sixth Circuit in the case at bar."[24] Yet, in *ALA* the court *declined* to grant the defendant's 12(b)(6) motion to dismiss on defendant's affirmative Statute of Frauds defense.[25] The plaintiff attached to its complaint for breach of contract a written and signed memorialization of an oral agreement for the sale of securities, alleging that the document established the existence of a contract.[26] Defendant moved for 12(b)(6) dismissal, asserting that the memorialization attached to the complaint evidenced an agreement to negotiate rather than an enforceable contract under the Statute of Frauds, and that Rule 10(c) required the court to provide the attached memorialization controlling weight over the plaintiff's allegation of an

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[23] 29 F.3d 855 (3rd Cir. 1994).

[24] Petition at 10.

[25] 29 F.3d 855, 862 (3rd Cir. 1994).

[26] *Id.* at 857.

enforceable contract.[27] The court agreed that "[w]here there is disparity between a *written instrument* annexed to the pleading and an allegation in the pleading *based thereon* the written instrument will control," but vacated the lower court's order granting defendant's motion to dismiss, on other grounds.[28] Petitioners' assertion that the *ALA* court's ruling is "different" than the Sixth Circuit's ruling is without import, as the allegations in the case at bar are neither based upon a written instrument alleged to evidence an enforceable contract nor the self-exculpatory statements made by Petitioners during the course of the internal investigation into Nathaniel Jones' death. Petitioners' assertion that *ALA* reveals conflict between this circuit and the Third Circuit over Rule 10(c) is entirely without merit and their petition should be denied.

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[27] *Id.* at 860-861.

[28] *Id.* at fn. 8, 859.

C. The Fourth Circuit.

Petitioners' assertion that *Demetry v. Lasko Prods., Inc.*[29] reveals conflict between the circuits over Rule 10(c) is likewise misplaced.[30] *Demetry* involved dismissal of the plaintiff's claim that the defendant deceptively sold defective fans that caused fires.[31] The plaintiff attached to his complaint a voluntary recall notice issued by defendant that established the defendant's affirmative defense.[32] The court applied Rule 10(c), and the fact that the defendant issued the voluntary recall notice was dispositive of the plaintiff's claims.[33] Petitioners' implication that *Demetry* is inconsistent with the present case is entirely without merit. The petition should be denied.

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[29] 2008 U.S. App. LEXIS 17458,*1 (4th Cir. 2008).

[30] Petition at 10.

[31] 2008 U.S. App. LEXIS 17458*, *1 (4th Cir. 2008).

[32] *Id.* at *1-*2, *4.

[33] *Id.*

D. The Fifth Circuit.

Petitioners assert that *Associated Builders, Inc. v. Alabama Power Co.*,[34] further reveals conflict between the circuits over Rule 10(c).[35] *Associated Builders* involved dismissal of the plaintiff's *sole claim* that a bond prospectus was misleading because it omitted that the bonds could be redeemed without premium prior to a certain date, under certain circumstances.[36] The plaintiff attached the prospectus to its complaint to evidence its sole allegation that the information was omitted.[37] Yet, the prospectus actually did include the information that the plaintiffs alleged to be omitted.[38] So, the court dismissed the plaintiff's sole claim that omission of the information rendered the prospectus misleading.[39]

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[34] 505 F.2d 97 (5th Cir. 1974).

[35] Petition at 10.

[36] 505 F.2d 97, 99 (5th Cir. 1974).

[37] *Id.*

[38] *Id.* at 100-101.

[39] *Id.* at 102.

Like the issue in *Wade*, the plaintiff's only claim relied solely on the allegation that the attached document did not include information which it did, in fact, include. Again, the claims brought by Mr. Jones' estate in no way rely on the admissions or denials included in the documents attached to his complaint. Petitioners' assertion that this ruling reveals a conflict between the circuits over Rule 10(c) is without merit. Petitioners' intimation that Respondents' claims should similarly be disposed of based on Petitioners' self-exculpatory statements strains credibility and their petition should be denied.

E. The Ninth Circuit.

Petitioners cannot point to *Coos County Bd. Of County Comm'rs v. Kepthorne,*[40] as a demonstration of further conflict between the circuits over Rule 10(c).[41] *Coos* involved dismissal of the plaintiff's claim that the defendant failed to perform a nondiscretionary act or duty by failing to remove a

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[40] 531 F.3d 792 (9th Cir. 2008).

[41] Petition at 10-11.

species from the endangered species list.[42] The plaintiff alleged that the defendants had a duty to remove the species from the list because, the plaintiff alleged, the U.S. Fish and Wildife Service concluded that the species should be removed from the list in a report.[43] The plaintiff attached a copy of the report to its complaint. Yet, the report did not conclude that the species should be removed from the endangered species list, but rather concluded the opposite.[44] The Ninth Circuit affirmed dismissal of the plaintiff's complaint, as the alleged statement in the report constituted the only conceivable allegation that defendants had a duty to remove the species from the list.[45] Petitioners' assertion that this ruling is in conflict with the Sixth Circuit's Rule 10(c) jurisprudence is without merit. In the case at bar, Respondents' claims do not reduce to Petitioners' admissions, to which Respondent's cited in their complaint. Nor do Respondent's claims rest upon Petitioners' self-

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[42] 531 F.3d 792, 810-811 (9th Cir. 2008).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 811-812

exculpatory statements, to which Respondents did not cite. Petitioners' assertion that *Coos* reveals conflict between the circuits over Rule 10(c) is also entirely without merit. The petition should be denied.

F. The Eleventh Circuit.

Petitioners assert that *Jenkins v. Fernandez*[46] reveals conflict between the circuits over Rule 10(c).[47] Jenkins involved dismissal of the plaintiff's claim "that he paid $350 to CCI for incorporation for services he has not received."[48] The plaintiff failed to allege an enforceable contract, but attached an invoice and his credit report to the complaint to establish that he made a credit card payment to the defendant.[49] Yet, the credit card number on the invoice did not match any of the accounts on Plaintiff's credit report.[50] Applying

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[46] 147 Fed. Appx. 107 (11th Cir. 2005).

[47] Petition at 10-11.

[48] 147 Fed. Appx. 107, 108 (11th Cir. 2005).

[49] *Id.* at 109, fn. 1

[50] *Id.*

Rule 10(c), the court concluded that it was not improper for the District Court to consider the documents attached by the plaintiff in ascertaining whether the plaintiff had stated a claim, and upheld the lower court's dismissal of the plaintiff's complaint as frivolous.[51] Petitioners' suggestion that *Jenkins* reveals conflict among the circuits over Rule 10(c) is again without merit. Petitioners' implication that *Jenkins* involved allegations and pleadings comparable to the present case and/or that their self-exculpatory statements should constitute allegations just as the plaintiff's invoice and credit report constituted allegations in *Jenkins* is entirely without merit. The petition should be denied.

G. The D.C. Circuit.

Finally, Petitioners assert that *Peoples Natural Gas Co. v. Fed. Power Comm'n*[52] further reveals conflict between the circuits over Rule 10(c).[53]

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[51] *Id.*

[52] 127 F.2d 153 (D.C. Cir. 1942).

[53] Petition at 11.

Peoples involved the defendant's opposition to the plaintiff's motion to compel the production of documents and records to ascertain the fairness of the defendant's pricing.[54] The District Court ordered production of the documents and records despite the defendant's averment that the plaintiff failed to allege that defendant was engaged in interstate commerce and thus subject to the plaintiff's jurisdiction.[55] Yet, the plaintiff had attached to its pleading a copy of a letter from plaintiff to plaintiff's counsel ordering the litigation and stating that the defendant was engaged in the transfer of natural gas from Pennsylvania to the State of New York.[56] The D.C. Circuit upheld the District Court's application of Rule 10(c) accepting the plaintiff's allegations contained in the plaintiff's letter attached to the complaint as adequately pleading that the defendant was engaged in interstate commerce.[57] Again, Petitioners' assertion that this case reveals conflict

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[54] 127 F.2d 153, 155 (D.C. Cir. 1942).

[55] *Id.*

[56] *Id.* 155-156

[57] *Id.*

between the circuits over Rule 10(c) strains credibility. Petitioners' implication that *Peoples* present circumstances similar to those in the present case is without merit. The petition for writ should be denied.

The cases submitted by Petitioners to establish conflict between the circuits over Rule 10(c) reveal no such conflict. Rather, the cases only reveal the myriad diverse circumstances under which Rule 10(c) may apply. Petitioners' suggestion that the "for all purposes" language in Rule 10(c) should be read to subvert all other rules of pleading and the rules and case law governing dispositive motions is without precedent. Petitioners' argument that the Sixth Circuit should have construed Petitioners' self-exculpatory statements to constitute allegations vouched for by Respondents and deemed true for the purpose of Petitioners' 12(b)(6) motion has been deemed "fantastic," "unworthy," "beyond nonsensical," "unprofessional" and "frivolous," in a case Petitioners astonishingly submit in support of their petition.[58] To be clear, Respondents have not vouched for Petitioners' self-

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[58] *Carroll v. Yates*, 362 F.3d 984, 986 (7th Cir. Ill. 2004).

exculpatory statements in pleading their claims. Again, the petition should be denied because Petitioners' assertions to the contrary are entirely without merit.

II. THE RECORD IS DEVOID OF ANY SUPPORT FOR PETITIONERS' ASSERTION THAT THE SIXTH CIRCUIT DISREGARDED THIS COURT'S DECISION IN *SCOTT v. HARRIS*.

Without record support, Petitioners assert that the Sixth Circuit "disregarded this Court's decision in *Scott v. Harris*."[59] Yet, at the same time, Petitioners admit that "*Scott v. Harris* was presented fully to the Sixth Circuit."[60] The record is absolutely devoid of any indication that the Sixth Circuit "disregarded *Scott v. Harris*" merely because the Sixth Circuit reached a conclusion opposite of Petitioners' as to the value of the video evidence to Petitioners' Rule 12 (b)(6) motion.

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[59] 127 S. Ct. 1769 (2007); Petition at 11.

[60] Petition at 13.

Petitioners fail to provide any authority for their assertion that the District Court abused its discretion in declining to consider the video evidence in resolving Petitioners' Rule 12(b)(6) motion, when "while the video may accurately reflect a portion of the incident a reasonable dispute may still exist as to the entirety of the events alleged in the Complaint."[61]

The video evidence at issue in *Scott v. Harris* displayed the entirety of the automobile chase and collision at issue.[62] In contrast, the public record video in the present case does not display the relevant events and conduct in their entirety. Much of the conduct relevant to Respondents' claims and Petitioners' defenses was not captured by the camera of the late-arriving cruiser, remained out of frame or was concealed by visual obstructions, such as the cruiser's hood.

In short, Petitioners provide no authority conflicting Sixth Circuit's affirmation that "[w]here

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[61] App. at 25a.

[62] http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb

the evidence captures only part of the incident and would provide a distorted view of the events at issue, as the district court concluded with respect to the videotape, we do not require a court to consider that evidence on a 12(b)(6) motion."[63] And Petitioners' wild assertions of "false lawyer-crafted allegations" are without record support.[64] Petitioners have failed to provide any plausible reason why they should not be required to answer Respondents' allegations and discover the truth about Nathaniel Jones' death, after *more than four years* of litigation. This Court should deny the Petition for Writ of Certiorari.

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[63] App. at 12a (internal citations omitted).

[64] Petition at 13, 14.

III. THE FEDERAL COURTS ARE NOT INCONSISTENT IN DEPLOYING THE SUBSTANTIVE DUE PROCESS STANDARD FOR A CLAIM OF FAILURE TO PROVIDE MEDICAL CARE.

Petitioners' assertion that the federal courts apply inconsistent substantive due process standards to claims alleging a failure to provide medical care to a detainee is entirely without merit and belied by every decision out of every circuit submitted by Petitioners to support their assertion.[65] Petitioners seem to want to assert that conflicting authority throughout the circuits demonstrates that "deliberate indifference" is inappropriate in such cases.[66] Yet, every circuit decision submitted by Petitioners employs the deliberate indifference standard to qualified immunity defenses to claims of failure to provide medical attention to detainees.[67]

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[65] Petition at 15-23.

[66] *Id.*

[67] *Mata v. Saiz*, 427 F.3d 745, 751 (11th Cir. 2005); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000); *Lolli v. Orange County*, 351 F.3d 410, 419 (9th Cir. 2003); *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997); *Gibson v. Weber*, 433 F.3d 642,

It appears Petitioners again conflate principal with application. There is no conflict between the federal circuits over whether the "deliberate indifference" standard applies to a qualified immunity defense to a failure to provide medical care to a detainee. This is demonstrated clearly by the case law to which Petitioners cite. Rather, the conclusion to be drawn from Petitioners' argument is the truism that

> the difficulty for all judges with qualified immunity has not been articulation of the rule, but rather the application of it. As Justice Holmes once said, "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."[68]

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646 (8th Cir. 2006); *Chapman v. Keltner*, 241 F.3d 842, 846 (7th Cir. 2001); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981); *Martin v. Gentile*, 849 F.2d 863, 870-871 (4th Cir. 1988); *Rouse v. Plantier*, 182 F.3d 192, 197 (3rd Cir. 1999); *Alsina-Ortiz v. Laboy*, 400 F.3d 77, 82-83 (1st Cir. 2005).

[68] *Flatford v. City of Monroe*, 17 F.3d 162, 167 (6th Cir. 1994)

Yet such an observation does not offer substantive ground for Petitioners' Petition for Writ of Certiorari. As Petitioners have failed to demonstrate the slightest conflict between the circuits as to whether the deliberate indifference standard applies in cases such as the present case, the Petition for Writ of Certiorari is without merit and should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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